

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JUDY BUNDORF, an individual; FRIENDS  
OF SEARCHLIGHT DESERT AND  
MOUNTAINS; BASIN AND RANGE  
WATCH; ELLEN ROSS, an individual; and  
RONALD VAN FLEET, SR., an individual,

Plaintiffs,

v.

S.M.R. JEWELL, Secretary of the Interior;  
BUREAU OF LAND MANAGEMENT; U.S.  
FISH & WILDLIFE SERVICE,

Defendants,

v.

SEARCHLIGHT WIND ENERGY, LLC,

Defendant-Intervenor.

Case No. 2:13-cv-00616-MMD-PAL

ORDER

(Pls.' Motion for Summary Judgment –  
dkt. no. 40)

(Def.-Intervenor's Counter Motion for  
Summary Judgment – dkt. no. 62)

(Defs.' Cross Motion for Summary  
Judgment – dkt. no. 80)

(Defs.' Motion to Strike – dkt. no. 53)

(Defs.' Motion to Strike – dkt. no. 78)

**I. SUMMARY**

Plaintiffs Judy Bundorf, Friends of Searchlight Desert and Mountains, Basin and Range Watch, Ellen Ross, and Ronald Van Fleet, Sr., allege that Defendants S.M.R. Jewell, Bureau of Land Management ("BLM"), and U.S. Fish and Wildlife Service ("FWS") (collectively, "Federal Defendants") violated several environmental statutes in approving a wind energy project in Southern Nevada. Searchlight Wind Energy, LLC ("Searchlight"), the project's proponent, intervened as a defendant in November 2013.

1 Before the Court are Plaintiffs' Motion for Summary Judgment ("MSJ") (dkt. no.  
2 40), Federal Defendants' Cross Motion for Summary Judgment ("Cross MSJ") (dkt. no.  
3 80), and Searchlight's Counter Motion for Summary Judgment ("Counter MSJ") (dkt. no.  
4 62).<sup>1</sup> The Court has reviewed the relevant oppositions (dkt. nos. 57, 59, 71) and replies  
5 (dkt. nos. 71, 77, 79).

6 Also before the Court are Federal Defendants' Motions to Strike Plaintiffs' extra-  
7 record evidence (dkt. nos. 53, 78). The Court has reviewed Plaintiffs' oppositions (dkt.  
8 nos. 73, 82), and Federal Defendants' reply (dkt. no. 75).<sup>2</sup> Searchlight joined Federal  
9 Defendants' first Motion to Strike (dkt. no. 68).

10 The Court held a hearing on the parties' pending motions on November 24, 2014.  
11 As a threshold matter, the Court grants, in part, and denies, in part, Federal Defendants'  
12 first Motion to Strike (dkt. no. 53) and denies Federal Defendants' second Motion to  
13 Strike (dkt. no. 78). The Court remands the administrative record ("AR") for further  
14 explanation from the appropriate federal agencies, and orders Federal Defendants to  
15 prepare a Supplemental Environmental Impact Statement ("SEIS"). In light of the  
16 remand, the Court declines to address the merits of the parties' other arguments in their  
17 motions for summary judgment. The Court therefore grants, in part, the MSJ, and denies  
18 the Cross MSJ and the Counter MSJ pending amplification of the AR.

## 19 **II. BACKGROUND**

20 The following facts are undisputed and appear primarily in the AR.<sup>3</sup> On March 13,  
21 2013, former Secretary of the Interior Ken Salazar approved a Record of Decision

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23 <sup>1</sup>The Cross MSJ is identical to Federal Defendants' opposition to the MSJ. (See  
24 dkt. nos. 59, 80.) Similarly, the Counter MSJ is nearly identical to Searchlight's  
25 opposition to the MSJ. (See dkt. nos. 57, 62.)

<sup>2</sup>Federal Defendants did not file a reply in support of their second Motion to Strike  
(dkt. no. 78).

<sup>3</sup>Federal Defendants lodged the AR with the Court as dkt. no. 27 in September  
26 2013. The AR was filed with the Court as two CD-ROMs containing consecutively  
27 paginated records from the BLM and FWS, respectively. In April 2014, BLM lodged a  
28 supplemental AR as dkt. no. 55. BLM's supplemental AR continues the consecutive  
pagination from BLM's first AR. The Court cites to the consecutive pages for each  
agency's AR. The Court cites BLM's AR as "BLM-AR," and FWS's AR as "FWS-AR."

1 (“ROD”) authorizing — but not finalizing<sup>4</sup> — two right-of-ways (“ROWs”) for the  
2 Searchlight Wind Energy Project (“Project”) on lands administered by the BLM. (BLM-AR  
3 1190, 1205.) The Project includes 87 Wind Turbine Generators (“WTG”) capable of  
4 providing up to 200 megawatts of electricity and a switching station to connect the wind  
5 facility to the electrical grid. (*Id.* at 1191, 1195-96.) The area associated with the Project  
6 covers approximately 18,949 acres, with a footprint of 9,331 acres; the ROD states that  
7 the Project’s facilities will occupy between 152 and 160 acres. (*Id.* at 1192, 1207.)  
8 Searchlight applied for the ROW to construct, operate, maintain, and decommission the  
9 wind facility while the Western Area Power Administration (“Western”), a federal agency,  
10 sought the ROW to carry out the same actions for the switching station. (*Id.* at 3023,  
11 3049.)

12 Searchlight began the ROW application process through a Plan of Development  
13 (“POD”) submitted in January 2008 for a wind energy project of up to 156 WTGs. (*Id.* at  
14 839-906.) BLM had initiated a 60-day public scoping period in December 2008. (*Id.* at  
15 3415.) Searchlight issued a revised POD in March 2011 describing a scaled-down  
16 project involving 87 WTGs. (*Id.* at 982.) BLM then issued a Draft Environmental Impact  
17 Statement (“DEIS”) in January 2012, and commenced a 90-day public comment period  
18 that ended in April 2012. (*Id.* at 3417.) Plaintiffs submitted comments on the DEIS in  
19 April 2012, and offered supplemental information in October 2012. (*Id.* at 534, 4304,  
20 4705.) BLM published a Final Environmental Impact Statement (“FEIS”) in December  
21 2012. (*Id.* at 3019.)

22 The ROD’s approval of the 87-WTG Project is based on the FEIS. (*Id.* at 1204.) In  
23 addition to the approved 87-WTG Project, the FEIS explores two alternative scenarios: a  
24 96-WTG Alternative and a No-Action Alternative. (*Id.* at 3027.) BLM determined that the

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26 <sup>4</sup>During the hearing, Federal Defendants asserted that several steps remain  
27 before the Project may proceed, including the following two steps. First, the ROWs must  
28 be finalized and issued to Searchlight and Western; Federal Defendants represented  
that Searchlight’s ROW has been finalized, but that, as of November 2014, Western’s  
ROW remained unsigned. Second, after both ROWs are finalized, BLM must determine  
whether to issue a Notice to Proceed to both Searchlight and Western.

1 96-WTG Alternative reflected the maximum number of turbines available to the Project.  
2 (*Id.* at 3070.) BLM described the 87-WTG option as a minimum threshold below which  
3 the Project would become economically unfeasible; the 87-WTG Alternative was BLM's  
4 Preferred Alternative. (*Id.* at 3069.) For both the 96-WTG Alternative and the 87-WTG  
5 Alternative, BLM assumed that the WTGs would reach a maximum height of 427.5 feet,  
6 with rotating blades spanning 331 feet in diameter. (*Id.* at 3083-84.)

7 Located approximately 60 miles southeast of Las Vegas and 1.5 miles east of the  
8 Lake Mead National Recreation Area, the Project would stretch around the town of  
9 Searchlight along the northeast side of the Piute Valley. (*Id.* at 3129.) This undeveloped  
10 area features Mojave Desert ecosystem that spreads across valleys, flats, washes, and  
11 hills and mountains locally known as the Searchlight Mountains. (Dkt. no. 40 at 9-10.)  
12 The Project is surrounded by a Desert Wildlife Management Area and the Piute-  
13 Eldorado Valley Area of Critical Environmental Concern, which BLM manages to protect  
14 critical habitat of the desert tortoise. (BLM-AR at 3057, 3188-89.)

15 Among other species, the FEIS identifies the desert tortoise, 16 bat species, and  
16 birds — including the golden eagle — as wildlife that would be affected by the Project.  
17 (See *id.* at 3153-64.) Because the desert tortoise is a threatened species under the  
18 Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, BLM consulted with FWS to  
19 ensure that the Project is “not likely to jeopardize the continued existence of” the desert  
20 tortoise. 16 U.S.C. § 1536(a)(2). As a result of the consultation, FWS issued a Biological  
21 Opinion (“BiOp”) in September 2012, concluding that “the action, as proposed, is not  
22 likely to jeopardize the continued existence of the species, and is not likely to adversely  
23 modify designated critical habitat.” (BLM-AR at 170.) The BiOp included an Incidental  
24 Take Statement outlining non-discretionary measures for activities that could result in a  
25 taking that is “incidental to and not the purpose of the agency action.” (*Id.* at 171.) To  
26 mitigate the Project’s adverse effects on desert tortoises, the FEIS lists the conservation  
27 measures laid out in the BiOp. (*Id.* at 3281-85.) For mitigation measures for bat and bird  
28

1 species, the FEIS references a Bird and Bat Conservation Strategy (“BBCS”) prepared  
 2 by Duke Energy Renewables in October 2012.<sup>5</sup> (*Id.* at 3288-90, 16145.)

3 Plaintiffs initiated this action in April 2013 pursuant to the Administrative  
 4 Procedure Act (“APA”), 5 U.S.C. §§ 701-706. Plaintiffs allege that in approving the ROD,  
 5 Federal Defendants violated the National Environmental Policy Act (“NEPA”), the ESA,  
 6 the Federal Land Policy and Management Act (“FLPMA”), the Bald and Golden Eagle  
 7 Protection Act (“BGEPA”) and the Migratory Bird Treaty Act (“MBTA”). (Dkt. no. 36.)  
 8 Under § 706(2) of the APA, Plaintiffs allege that the ROD is arbitrary, capricious, an  
 9 abuse of discretion, and contrary to law. 5 U.S.C. § 706(2)(A); (dkt. no. 36 ¶ 96). Among  
 10 other remedies, Plaintiffs ask that the Court reverse, set aside, vacate, and remand the  
 11 FEIS, BiOP, and ROD. (Dkt. no. 36 at 31-32.) Additionally, under § 706(1) of the APA,  
 12 Plaintiffs allege that BLM must supplement the FEIS in light of new information on how  
 13 industrial-scale energy projects, including wind energy projects, affect wildlife and human  
 14 health. (*Id.* ¶ 101.) Plaintiffs also seek temporary, preliminary, or permanent injunctive  
 15 relief that would enjoin Defendants from allowing construction to commence. (*Id.* at 32.)

### 16 **III. MOTIONS TO STRIKE**

17 As a threshold matter, Federal Defendants request that the Court strike two  
 18 declarations that Plaintiffs submitted in support of their MSJ. (Dkt. nos. 53, 78.) The  
 19 declarations (dkt. nos. 44, 72) are from Scott T. Cashen, a biological resources expert  
 20 (the “Cashen Declarations”). Federal Defendants contend that the Cashen Declarations  
 21 and accompanying exhibits amount to extra-record evidence that the Court cannot  
 22 consider in reviewing the ROD. The Court disagrees.

#### 23 **A. Legal Standard**

24 The Court reviews Federal Defendants’ approval of the ROWs under the APA  
 25 because the other statutes under which Plaintiffs challenge the ROD’s approval do not  
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27 <sup>5</sup>As of October 2012, Searchlight was a wholly owned subsidiary of Duke Energy  
 28 Renewables. (BLM-AR at 3023.) Searchlight is now a wholly owned subsidiary of Apex  
 Wind Energy I LLC. (Dkt. no. 57 at 3.)

1 create private rights of action. See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186,  
 2 1206-07 (9th Cir. 2004) (noting that NEPA, ESA, and MBTA lack provisions for judicial  
 3 review). Plaintiffs seek relief under § 706(1) and § 706(2) of the APA — the former  
 4 allows courts to “compel agency action unlawfully withheld or unreasonably delayed,” 5  
 5 U.S.C. § 706(1), while the latter enables courts to set aside a final agency action only if it  
 6 is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”  
 7 5 U.S.C. § 706(2)(A); *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051,  
 8 1059 (9th Cir. 2003) (en banc), *amended by* 360 F.3d 1374 (2004).

9 In determining whether to compel agency action under § 706(1), courts may look  
 10 to evidence outside an agency’s administrative record because “there is no final agency  
 11 action to demarcate the limits of the record.” *Friends of Clearwater v. Dombeck*, 222  
 12 F.3d 552, 560 (9th Cir. 2000).

13 Under § 706(2), courts “are required to ‘engage in substantial inquiry, a thorough,  
 14 probing, in-depth review.’” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d  
 15 953, 960 (9th Cir. 2005) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.  
 16 402, 415-16 (1971) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99  
 17 (1977))) (alteration omitted). As a general rule, however, review under § 706(2) is usually  
 18 limited to the administrative record that existed at the time of the agency decision and  
 19 that the agency presents to the court. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729,  
 20 743-44 (1985); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450  
 21 (9th Cir. 1996).

22 The Ninth Circuit recognizes four exceptions to this general rule regarding  
 23 § 706(2) review. District courts have discretion to look beyond the administrative record  
 24 in the following circumstances:

25 (1) if admission is necessary to determine whether the agency has  
 26 considered all relevant factors and has explained its decision, (2) if the  
 27 agency has relied on documents not in the record, (3) when supplementing  
 the record is necessary to explain technical terms or complex subject  
 matter, or (4) when plaintiffs make a showing of agency bad faith.

28 ///

1 *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (quoting *Sw. Ctr. for*  
 2 *Biological Diversity*, 100 F.3d at 1450) (internal quotation marks omitted). These  
 3 exceptions “are narrowly construed and applied” to foreclose improper de novo review of  
 4 agency decisions. *Id.* Parties may not use extra-record evidence “as a new  
 5 rationalization either for sustaining or attacking [an] [a]gency’s decision.” *Ass’n of Pac.*  
 6 *Fisheries v. E.P.A.*, 615 F.2d 794, 811-12 (9th Cir. 1980). Thus, rather than expand the  
 7 scope of evidentiary review, “these limited exceptions operate to identify and plug holes  
 8 in the administrative record.” *Lands Council*, 395 F.3d at 1030. Parties seeking to  
 9 expand the scope of review bear a “heavy burden to show that the additional materials  
 10 sought are necessary to adequately review” an agency’s decision. *Fence Creek Cattle*  
 11 *Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

## 12 **B. Discussion**

13 The Cashen Declaration submitted in support of Plaintiffs’ MSJ (“First  
 14 Declaration”) (dkt. no. 44) identifies factors that were allegedly ignored in the wildlife  
 15 analyses carried out before the ROD’s approval, while the declaration that accompanied  
 16 Plaintiffs’ reply (“Second Declaration”) (dkt. no. 72) highlights new information that,  
 17 Plaintiffs assert, warrants an SEIS. The Court addresses each declaration in turn.

### 18 **1. First Declaration**

19 Plaintiffs argue that the Court may consider the First Declaration under either the  
 20 first or third exceptions. *See Lands Council*, 395 F.3d at 1030. For the first exception,  
 21 Plaintiffs assert that the First Declaration identifies factors that Federal Defendants failed  
 22 to consider or explain in their wildlife analyses, such as the protocols that governed  
 23 baseline surveys of wildlife in and around the Project area, certain conclusions about  
 24 adverse effects on wildlife habitat, and the efficacy of various mitigation measures. (Dkt.  
 25 no. 73 at 6-9; see, e.g., dkt. no. 44 ¶¶ 6-7, 11-17, 24, 27, 35-40, 42-46, 50, 56-60, 62-  
 26 67.) For the third exception, Plaintiffs contend that the declarations help explain at least  
 27 two technical matters to the Court: first, calculations underlying a remuneration fee that  
 28 appears in the FEIS, and second, protocols for avian surveys. (Dkt. no. 73 at 10-11; see

1     dkt. no. 44 at ¶¶ 28-31, 36-46.) The Court finds that assertions in the First Declaration  
 2     fall within the first exception, but not the third.

3                     **a.     First Exception**

4             Courts may admit evidence under the first exception “only to help the court  
 5     understand whether the agency complied with the APA’s requirement that the agency’s  
 6     decision be neither arbitrary nor capricious.” *San Luis & Delta-Mendota Water Auth. v.*  
 7     *Locke* (*San Luis v. Locke*), No. 12-15144, 2014 WL 7240003, at \*9 (9th Cir. Dec. 22,  
 8     2014). In two recent decisions, the Ninth Circuit has rejected extra-record evidence that  
 9     district courts admitted under this exception, but that was used to “judge the wisdom of  
 10    the agency’s scientific analysis.” *Id.*; see also *San Luis & Delta-Mendota Water Auth. v.*  
 11    *Jewell* (*San Luis v. Jewell*), 747 F.3d 581, 602-04 (9th Cir. 2014). In *San Luis v. Locke*,  
 12    the Ninth Circuit rejected the district court’s references to expert declarations that  
 13    critiqued the agency’s statistical analyses, suggested alternative statistical inquiries, and  
 14    offered competing interpretations of the agency’s data. See *San Luis v. Locke*, 2014 WL  
 15    7240003, at \*10 (citing *In re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802 (E.D.  
 16    Cal. 2011)). Similarly, in *San Luis v. Jewell*, the Ninth Circuit admonished the district  
 17    court for creating a battle of the experts by admitting approximately 40 expert  
 18    declarations, relying on those extra-record materials “as the basis for rejecting [a  
 19    Biological Opinion],” and effectively initiating “a post-hoc notice-and-comment  
 20    proceeding involving the parties’ experts, and then judg[ing] the [agency’s decision]  
 21    against the comments received.” *San Luis v. Jewell*, 747 F.3d at 603-04.

22             Here, Plaintiffs ask the Court to consider two declarations from the same expert  
 23     primarily — but not exclusively — for the purpose of identifying factors missing from  
 24     Federal Defendants’ wildlife analyses. Federal Defendants argue that “all of the ‘factors’  
 25     identified by Plaintiffs were considered, thoroughly, by the agencies.” (Dkt. no. 75 at 5.)  
 26     The Court agrees that some of the factors raised in the First Declaration were  
 27     considered and explained in the FEIS or its underlying documents. Those factors  
 28     include, among others, the Project’s cumulative impacts on desert tortoise habitat and

1 populations (see dkt. no. 44 ¶ 20; BLM-AR at 169-70; FWS-AR at 2160) and the  
 2 presence of bald eagles near the Project area (see dkt. no. 44 ¶ 36; BLM-AR 4125).  
 3 Moreover, with regard to survey methodologies, the Court notes that “NEPA’s requisite  
 4 hard look does not require adherence to a particular analytic protocol.” *Or. Natural*  
 5 *Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2008) (citation and  
 6 internal quotation marks omitted). The Court will therefore strike Mr. Cashen’s critiques  
 7 of the agencies’ selected methods.<sup>6</sup> (See, e.g., dkt. no. 44 ¶¶ 37, 42.) The Court further  
 8 finds that some assertions constitute improper critiques of Federal Defendants’ scientific  
 9 analyses, including how the agencies classified nests observed during golden eagle  
 10 surveys. (See, e.g., *id.* ¶¶ 44-45.) The Court, however, declines to strike the First  
 11 Declaration in its entirety, and finds that the following portions of the First Declaration  
 12 point out factors that are missing from Federal Defendants’ wildlife analyses, and that  
 13 the reasons for their absence are not clear from the AR.

14 First, Mr. Cashen identifies several gaps in the desert tortoise analyses, including  
 15 unexplained inconsistencies in BLM’s and FWS’s use of survey data to calculate desert  
 16 tortoise density.<sup>7</sup> (See *id.* ¶¶ 6-7); see also *Lands Council*, 395 F.3d at 1031-32 (NEPA  
 17 requires “up-front disclosures of relevant shortcomings in the data or models,” and an  
 18 FEIS must “contain high-quality and accurate scientific analysis”). The declaration further  
 19 notes that conclusions regarding the fragmentation of desert tortoise habitat — including  
 20 adverse effects caused by noise and the population effects of the potential loss of “highly  
 21 suitable” habitat (BLM-AR at 165) — lack clear explanations. (Dkt. no. 44 ¶¶ 8, 11-17;  
 22 see BLM-AR at 161, 163, 165-66, 168-69, 173, 3279-85; FWS-AR at 207-08.) Moreover,  
 23 as the declaration suggests (dkt. no. 44 ¶¶ 27-28), the mitigation measures outlined in  
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25 <sup>6</sup>The Court will not, however, strike those portions of the Cashen Declarations that  
 26 identify unexplained discrepancies between data in the FEIS (or its references) and  
 prescribed methodologies. (See, e.g., dkt. no. 44 ¶¶ 38, 41, 43.)

27 <sup>7</sup>Federal Defendants do not dispute that these inconsistencies exist. (See dkt. no.  
 28 80 at 23-24.) Moreover, during oral argument, counsel for Federal Defendants  
 acknowledged that Federal Defendants are uncertain as to which agency’s density  
 calculation is correct.

1 the BiOp and in the FEIS warrant further explanation — for instance, it is not clear  
2 whether Federal Defendants considered the long-term effects of blasting on desert  
3 tortoises. (See BLM-AR at 151, 3120.) Finally, neither the BiOp nor the FEIS explains  
4 the per-acre remuneration rate used to calculate the remuneration fee. (Dkt. no. 44 ¶¶  
5 28-31; see BLM-AR at 164-69, 178, 187, 3279-85.)

6 Next, the First Declaration indicates that there are gaps underlying BLM's  
7 conclusion that risks to bald eagles are nonexistent, even in light of baseline surveys  
8 conducted in December 2011 and January 2012 that yielded no observations of bald  
9 eagles. (See dkt. no. 44 ¶¶ 35, 40.) This conclusion warrants further explanation.  
10 Indeed, the report from the winter 2012 baseline survey, which the BBCS references,  
11 does not appear to be in BLM's AR — only observation worksheets reflecting raw data  
12 collected during the winter survey are available. (See BLM-AR at 418-22, 4125.)

13 Most of the First Declaration's discussion of golden eagles focuses on survey  
14 methodology. (See dkt. no. 44 ¶¶ 41-46.) As noted above (see *supra* note 6), the Court  
15 will consider the First Declaration's discussion of Federal Defendants' adherence to  
16 FWS's survey protocols for golden eagles to the extent they were available when the  
17 golden eagle surveys occurred. (Dkt. no. 44 ¶ 41, 43; *but see* BLM-AR at 3737  
18 (suggesting that no Nevada-specific survey protocols were available when the baseline  
19 surveys were developed).) The Court will also review the declaration's discussion of lost  
20 recruitment as a risk to golden eagles, which does not appear in the FEIS's or BBCS's  
21 discussion of annual mortality estimates. (Dkt. no. 44 ¶ 49; see BLM-AR at 3289-90,  
22 4132-35.) The Court will also consider the First Declaration's statement that an analysis  
23 of the cumulative effects on golden eagles is absent from the FEIS. (Dkt. no. 44 ¶ 51;  
24 see BLM-AR at 3411.) The First Declaration additionally notes that FWS suggested that  
25 the Project proponents seek a programmatic take permit for golden eagles and develop  
26 an Eagle Conservation Plan. (Dkt. no. 44 ¶ 50.) The Court will consider this portion of  
27 the First Declaration because it is not clear how FWS's suggestion factored into the  
28 Project's approval. (See BLM-AR 134, 430-31.)

1 Finally, with respect to bats, the Court finds that the first exception applies to the  
2 First Declaration's identification of mitigation measures that the FEIS does not consider  
3 or explain, including mitigation for the Project's anticipated adverse effects to roosting  
4 habitats (see dkt. no. 44 ¶¶ 57, 59; BLM-AR at 4140-41, 4146-53, 4198), and how a plan  
5 to curtail turbine operations to curb bat and bird fatalities will operate. (See dkt. no. 44 ¶¶  
6 62, 65-67; BLM-AR at 4150-51.)

7 **b. Third Exception**

8 Plaintiffs additionally contend that the First Declaration helps explain technical  
9 terms and complex subject matter by discussing the avian survey methodologies and  
10 remuneration fees for desert tortoise mitigation. (Dkt. no. 73 at 10-11.) Under the third  
11 exception, the Court may admit extra-record evidence as background information on  
12 complex issues. *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982). But  
13 neither the survey methodologies nor the remuneration fee calculation are complex  
14 enough to require looking beyond the AR. Rather, as discussed above, the First  
15 Declaration identifies factors missing from the AR's treatment of both avian survey  
16 methodologies and desert tortoise remuneration fees.

17 Because further explanation of these factors is necessary for the Court's review of  
18 Federal Defendants' decision to approve the Project, the Court denies, in part, Federal  
19 Defendants' Motion to Strike (dkt. no. 53). Moreover, in light of these missing factors, the  
20 Court will remand the AR to Federal Defendants for amplification rather than review the  
21 ROD on the merits with the help of the First Declaration.

22 **2. Second Declaration**

23 The Second Declaration offers new information about the abundance and range  
24 of golden eagles in the Project area. (See dkt. no. 72.) Whereas Plaintiffs offered the  
25 First Declaration to support their contention that the ROD's approval was arbitrary and  
26 capricious under APA § 706(2), Plaintiffs rely on the Second Declaration to argue, under  
27 APA § 706(1), that Federal Defendants must prepare an SEIS in light of new information  
28 that affects ongoing federal actions. Defendants urge the Court to strike the Second

1 Declaration, arguing that Plaintiffs cannot compel BLM to prepare an SEIS because no  
 2 major federal action remains to occur. (Dkt. no. 77 at 22.)<sup>8</sup> Given that courts may look  
 3 outside the administrative record in reviewing actions brought under APA § 706(1), the  
 4 Court disagrees. *See Friends of Clearwater*, 222 F.3d at 560.

5 NEPA's implementing regulations require a federal agency to supplement its FEIS  
 6 if "[t]here are significant new circumstances or information relevant to environmental  
 7 concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(ii).  
 8 Because "[a]n action to compel an agency to prepare an SEIS . . . [is] an action arising  
 9 under 5 U.S.C. § 706(1)," reviewing courts are not limited to the administrative record.  
 10 *Friends of Clearwater*, 222 F.3d at 560. The Court thus declines to strike the Second  
 11 Declaration because it may review materials outside the AR in determining whether to  
 12 compel the preparation of an SEIS. Here, the Court compels the preparation of an SEIS.  
 13 (See discussion *infra* Part IV.B.1.)

#### 14 **IV. MOTIONS FOR SUMMARY JUDGMENT**

##### 15 **A. Legal Standard**

16 Summary judgment is appropriate when "the movant shows that there is no  
 17 genuine dispute as to any material fact and the movant is entitled to judgment as a  
 18 matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
 19 (1986). Where, as here, review of an agency action is sought not based upon a "specific  
 20 authorization in the substantive statute, but only under the general review provisions of  
 21 the APA," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990), the court does not  
 22 determine whether there are disputed issues of material fact as it would in a typical  
 23 summary judgment proceeding. Rather, the court's review is based on the administrative  
 24 record. *Nw. Motorcycle Ass'n v. U.S. Dept. of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994).

25 A court may reverse an agency decision only if it is "arbitrary, capricious, an  
 26 abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An

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27 <sup>8</sup>Because Federal Defendants failed to file a reply in support of their motion, the  
 28 Court relies on arguments presented in the Cross MSJ briefing, and at the hearing.

1 agency's decision may be reversed as arbitrary and capricious "if the agency has relied  
 2 on factors which Congress has not intended it to consider, entirely failed to consider an  
 3 important aspect of the problem, offered an explanation for its decision that runs counter  
 4 to the evidence before the agency, or is so implausible that it could not be ascribed to a  
 5 difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.,*  
 6 *Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (U.S. 1983).

7 In reviewing an agency's decision under this standard, "the reviewing court may  
 8 not substitute its judgment for that of the agency." *Envtl. Def. Ctr., Inc. v. U.S. Env'tl. Prot.*  
 9 *Agency*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). Although this review is narrow, "a  
 10 reviewing court must conduct a searching and careful inquiry into the facts." *Nw.*  
 11 *Motorcycle Ass'n*, 18 F.3d at 1471. "A satisfactory explanation of agency action is  
 12 essential for adequate judicial review, because the focus of judicial review is not on the  
 13 wisdom of the agency's decision, but on whether the process employed by the agency to  
 14 reach its decision took into consideration all the relevant factors." *Asarco, Inc. v. U.S.*  
 15 *Env'tl. Prot. Agency*, 616 F.2d 1153, 1159 (1980). Thus, "[w]hen there is a need to  
 16 supplement the record to explain agency action, the preferred procedure is to remand to  
 17 the agency for its amplification." *Pub. Power Council*, 674 F.2d at 794.

## 18 **B. Discussion**

19 Plaintiffs argue that Federal Defendants' ROD is arbitrary and capricious because  
 20 it violates the MBTA, the BGEPA, and FLPMA, and because it was premised on a faulty  
 21 FEIS that violates NEPA. Plaintiffs further contend that Federal Defendants must  
 22 supplement the FEIS in light of recent information addressing the impact of wind energy  
 23 projects on wildlife and human health. Additionally, Plaintiffs argue that FWS's BiOp fails  
 24 to comply with the ESA and is therefore arbitrary and capricious. Defendants insist that  
 25 the ROD and its underlying documents complied with these statutes.

### 26 **1. NEPA**

27 NEPA is a procedural statute that requires federal agencies to "assess the  
 28 environmental consequences of their actions before those actions are undertaken."

1 *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir.  
2 2004). NEPA also provides for public participation in assessing a proposed action's  
3 environmental consequences, enabling the public to "play a role in both the  
4 decisionmaking process and the implementation of that decision." *Robertson v. Methow*  
5 *Valley Citizens Council*, 490 U.S. 332, 349 (1989). Although NEPA lacks a substantive  
6 mandate, its "action-forcing" procedural requirements help carry out a "national  
7 commitment to protecting and promoting environmental quality." *Id.* at 348. As part of  
8 these action-forcing requirements, NEPA mandates that agencies considering "major  
9 Federal actions significantly affecting the quality of the human environment" must, to the  
10 fullest extent possible, prepare an environmental impact statement ("EIS"). 42 U.S.C.  
11 § 4332(C); 40 C.F.R. § 1508.11.

12 The EIS "shall provide full and fair discussion of significant environmental impacts  
13 and shall inform decisionmakers and the public of the reasonable alternatives which  
14 would avoid or minimize adverse impacts or enhance the quality of the human  
15 environment." 40 C.F.R. § 1502.1. After an agency has prepared a draft or final EIS, the  
16 agency must issue an SEIS if "[t]here are significant new circumstances or information  
17 relevant to environmental concerns and bearing on the proposed action or its impacts."  
18 40 C.F.R. § 1502.9(c)(1)(ii). This regulation applies (1) "[i]f there remains major Federal  
19 action to occur," and (2) "if the new information is sufficient to show that the remaining  
20 action will affect the quality of the human environment in a significant manner or to a  
21 significant extent not already considered." *Marsh v. Or. Natural Res. Council*, 490 U.S.  
22 360, 374 (1989) (alternations and internal quotation marks omitted). An agency cannot  
23 ignore "new information that may alter the results of its original environmental analysis."  
24 *Friends of Clearwater*, 222 F.3d at 557.

25 Plaintiffs argue that Federal Defendants violated NEPA by relying on a faulty and  
26 incomplete FEIS in approving the ROD. Plaintiffs allege that three flaws undermine the  
27 FEIS: (1) the FEIS failed to take a hard look at the Project's environmental  
28 consequences, including the Project's impacts on wildlife, human health, and property;

1 (2) the FEIS's Statement of Purpose and Need was impermissibly narrow, which unduly  
2 limited the range of alternatives considered; and (3) the FEIS must account for recent  
3 information on the effects of industrial-scale wind energy projects on wildlife and human  
4 health. (Dkt. no. 40 at 23-38.) Defendants argue that Plaintiffs improperly attack FEIS's  
5 methodologies and scientific conclusions about wildlife, that the FEIS's Statement of  
6 Purpose and Need and alternatives analysis comply with NEPA and its implementing  
7 regulations, and that Federal Defendants need not prepare an SEIS because Federal  
8 Defendants will take no further major federal action. (Dkt. no. 80 at 32-52.)

9 Based on the above analysis, the Court finds that further explanation from Federal  
10 Defendants is necessary before the Court can review the merits of Plaintiffs' claim that  
11 the FEIS violates NEPA. *See Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th  
12 Cir. 1989) ("If the court determines that the agency did not consider all the relevant  
13 factors then it should remand the matter to the agency."). As noted, the Court declines to  
14 strike certain portions of the First Declaration because they exhibit relevant factors that  
15 are missing from Federal Defendants' wildlife analyses. In amplifying the AR upon  
16 remand, FWS and BLM should, at a minimum, address gaps in the FEIS's and BiOP's  
17 analyses of the density of desert tortoises, the adverse effects on desert tortoise habitat  
18 due to noise, and the remuneration fees and blasting mitigation measures. FWS and  
19 BLM should further explain the status of FWS's recommendations regarding eagle take  
20 permitting and an Eagle Conservation Plan. BLM should also address its conclusions  
21 about risks to bald eagles, protocols for golden eagle surveys, and risks and mitigation  
22 measures for bat species.

23 The Court also finds that an SEIS is warranted because the Second Declaration  
24 offers significant new information about the Project's environmental effects, and because  
25 major federal actions remain to occur. *See Marsh*, 490 U.S. at 374. Specifically, the

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1 Second Declaration suggests that, based on nest surveys conducted in 2011,<sup>9</sup> there is a  
 2 much larger presence of golden eagles within 10 miles of the Project area than the FEIS  
 3 reports. (See dkt. no. 72 ¶¶ 5-8 (noting that recent data show 19 probable or confirmed  
 4 golden eagle nests within 5 miles of the Project site, while the FEIS discloses 3 nests  
 5 within 10 miles); BLM-AR at 4123.) The declaration additionally states that data are now  
 6 available about the size of golden eagles' home ranges and their foraging distances in  
 7 the Mojave Desert. (Dkt. no. 72 ¶ 11.) In assessing the Project's risks to golden eagles,  
 8 the FEIS relies on data from Idaho habitats, noting that such data were not available for  
 9 Mojave Desert habitats. (See BLM-AR 4130.) In December 2012, however, researchers  
 10 published a study addressing golden eagle home ranges and foraging distances in the  
 11 Mojave Desert. (Dkt. no. 72 ¶ 11.) The study shows larger home range sizes and  
 12 foraging distances than those reported in the FEIS. (*Id.*) Taken together, this new  
 13 information is sufficient to show significant environmental effects that Federal  
 14 Defendants should consider in an SEIS.

15 Furthermore, the Court finds that BLM retains enough discretion in finalizing  
 16 Western's currently unissued ROW<sup>10</sup> to constitute an ongoing major federal action. See  
 17 *Marsh*, 490 U.S. at 374 (an SEIS may be compelled if "there remains major federal  
 18 action to occur"). Although Federal Defendants concede that BLM retains some  
 19 discretion in issuing the ROW, they argue that the ROD finalized the major federal action  
 20 to which the NEPA analysis applied. Specifically, the FEIS assisted BLM in deciding  
 21 whether to (1) "[a]pprove the Proposed Action or alternative and grant the ROWs to  
 22 [Searchlight] and Western;" (2) "[a]pprove the Proposed Action or alternative and grant  
 23 the ROWs with mitigation measures;" or (3) "[d]eny the ROW applications." (BLM-AR at  
 24 3054.) This decision is governed, in part, by 43 C.F.R. § 2805.10(a)(1), which states that  
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26 <sup>9</sup>Plaintiffs assert that the 2011 surveys were part of a program funded by BLM's  
 27 Nevada office. (Dkt. no. 72 ¶ 2.) During the hearing, Federal Defendants represented  
 28 that they were unaware whether BLM considered these surveys in its NEPA analysis.

<sup>10</sup>As of the November 24, 2014, hearing, BLM had not issued Western's ROW.

1 a ROW applicant will receive an unsigned ROW grant after BLM approves its  
2 application. The next subsection, however, notes that if an applicant “agrees with the  
3 terms and conditions in the unsigned grant,” BLM “will sign the grant and return it to [an  
4 applicant] with a final decision issuing the grant *if the regulations in this part . . . remain*  
5 *satisfied.*” 43 C.F.R. § 2805.10(b) (emphasis added). These regulations confirm that  
6 BLM retains some discretion in issuing a final ROW grant.

7 Federal Defendants cite several distinguishable cases to argue that the discretion  
8 BLM retains is insufficient to warrant an SEIS. First, in *Norton v. Southern Utah*  
9 *Wilderness Alliance (SUWA)*, 542 U.S. 55, 71-73 (2004), the Supreme Court held that no  
10 major federal action remained after the approval of a land use plan, which the Court  
11 characterized as “generally a statement of priorities [that] guides and constrains actions,  
12 but does not (at least in the usual case) prescribe them.” Similarly, in *Cold Mountain v.*  
13 *Garber*, 375 F.3d 884, 894 (9th Cir. 2004), the Ninth Circuit concluded that because the  
14 federal agency had already approved and issued a helicopter take permit, no major  
15 federal action remained to occur. Here, conversely, the ROW has not yet been issued to  
16 Western. Nor is BLM’s decision merely a guidance document or a statement of priorities,  
17 as was the case in *SUWA*. Rather, BLM may prescribe modifications in deciding whether  
18 to issue an ROW grant to Western. See, e.g., 43 C.F.R. § 2804.26 (listing reasons for  
19 which BLM may refuse to issue an ROW). Accordingly, the Court finds that a major  
20 federal action remains to occur. Federal Defendants must prepare an SEIS that  
21 addresses the new information about golden eagles in and around the Project area.

## 22 2. ESA, FLPMA, BGEPA, MBTA

23 Because the Court will remand the ROD, FEIS, and BiOp to Federal Defendants,  
24 the Court declines to address the merits of the parties’ remaining arguments under the  
25 ESA, FLPMA, the BGEPA and the MBTA.

## 26 V. CONCLUSION

27 The Court notes that the parties made several arguments and cited to several  
28 cases not discussed above. The Court has reviewed these arguments and cases and

1 determines that they do not warrant discussion as they do not affect the outcome of the  
2 Motions.

3 It is ordered that Federal Defendants' Motion to Strike (dkt. no. 53) is granted in  
4 part and denied in part. It is further ordered that Federal Defendants' second Motion to  
5 Strike (dkt. no. 78) is denied. The Court remands the Record of Decision, the Final  
6 Environmental Impact Statement, and the Biological Opinion to the appropriate federal  
7 agencies for amplification of the administrative record to explain the missing factors that  
8 the Court has identified.

9 It is further ordered that Plaintiffs' Motion for Summary Judgment (dkt. no. 40) is  
10 granted in part. Federal Defendants are to prepare a Supplemental Environmental  
11 Statement addressing the Project's effects on golden eagles in light of the new  
12 information discussed above. Federal Defendants' Cross Motion for Summary Judgment  
13 (dkt. no. 80) and Searchlight's Counter Motion for Summary Judgment (dkt. no. 62) are  
14 denied pending amplification of the administrative record.

15 DATED THIS 3<sup>rd</sup> day of February 2015.

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18 MIRANDA M. DU  
19 UNITED STATES DISTRICT JUDGE  
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